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In the Supreme Court of the United States

OCTOBER TERM, 1962

GUNDERSON BROS. ENGINEERING CORPORATION, an Oregon corporation,
Petitioner,

vs.

MERRITT-CHAPMAN AND SCOTT CORPORATION, a Delaware corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Gunderson Bros. Engineering Corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit as entered in the above-entitled cause on June 19, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 305 F.2d 659 and is printed in Appendix A hereof, page A1. The opinion of the District Court upon denial of Respondent's motion for judgment

n.o.v. and, in the alternative, for a new trial, is unreported and is printed in Appendix B hereof, page A11.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered June 19, 1962 (R. 734) and petition for rehearing filed July 17, 1962 was denied August 13, 1962 (R. 735). The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

Whether, in a diversity action for breach of contract, the Court of Appeals in reversing a judgment solely because it viewed the evidence as being insufficient to support the verdict of the jury after the trial judge had expressly found otherwise, was re-examining facts as forbidden by the Seventh Amendment and otherwise exceeding its limited appellate jurisdiction so as to have deprived Petitioner of its right to trial by jury.

Whether Petitioner in this diversity case received the appellate review which the good public reputation of the Court of Appeals required and which Congress intended in the enactment of 28 USC § 292(a) by reason of the three-judge panel of the Court of Appeals including a District Judge of Seattle, Washington where the sole issue decided against the District Judge of Spokane, Washington who tried the case was the sufficiency of evidence to support the verdict of the jury which in turn involved the local law of Washington and over which the trial judge's permissible views of such law were required to have been followed by the Court of Appeals.

CONSTITUTION AND STATUTES INVOLVED

1. The Seventh Amendment reading:

> "In Suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. Act of June 25, 1948, c. 646, 62 Stat. 901, 28 USC § 292(a) reading:

> "(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit."

STATEMENT OF THE CASE

Petitioner Gunderson Bros. Engineering Corp., of Portland, Oregon, sued Respondent, Merritt-Chapman and Scott Corporation, of New York City, in the District Court for breach of contract. District Court jurisdiction was based upon diversity of citizenship. The factual issue was whether or not Respondent, through words and conduct of its officers and agents, had accepted Petitioner's written offer. The jury found that Respondent had accepted such offer, only to thereafter breach its contract to Petitioner's damage in the amount of $98,387.10. Thereafter, the trial judge in a written opinion, denying both of Respondent's motions for judgment notwithstanding the verdict and in the al-